JACKSON REPORT ARTICLE: LITIGATION FUNDING

Lord Justice Jackson's final report on costs in civil litigation is a formidable piece of work with a number of innovative ideas. Indeed, the breadth of the report is such that a short article can only consider some of the ideas and themes which the report itself recognises are interlocking and should be viewed as a whole.

A number of the themes and recommendations have particular relevance to personal injury litigation.

The report concludes the current system can drive disproportionate costs. However, proportionality, under the Civil Procedure Rules, reflects not just the value of the claim but other matters including the issues involved. Given the report views proportionality essentially just in the relationship between costs and value raises the question whether, in personal injury claims, levels of damages are adequate. If damages had been increased in line with recommendations made by the Law Commission in 1999 the relationship between costs and value would now look very different.

Some of the key drivers of costs identified in the report, such as extensive disclosure and drafting witness statements, are not factors of significance in the costs of personal injury litigation. Of more relevance is late settlement but, in personal injury litigation, this is a matter very much in the control of defendants who always have the power to make early admissions and realistic offers, costs incurred through a failure to do so might be more accurately described as being generated by inadequate risk assessment on the part of defendants.

The report contends the recoverability of additional liabilities contributes to disproportionate costs. Once again it is worth noting the Civil Procedure Rules take a different approach, excluding additional liabilities for the purposes of considering whether costs are proportionate, perhaps reflecting the background to recoverability.

Before 2000 legal aid was available for personal injury claims and part of the deal, for removing its availability, was that additional liabilities became recoverable. The report proposes, in effect, a return to the position prior to 2000, but it is not proposed that legal aid be restored as a counterbalance.

The report does recommend the level of damages for pain suffering and loss of amenity be increased by 10% to fund success fees (though subject to a cap). However, any such increase is largely illusory as the proposal would achieve less.

Any such increase in damages is, in a sense, illusory as the proposal would achieve less than has previously been recommended by the Law Commission. In any event there are real questions to be asked about whether this broad brush approach is likely to achieve a fair way of allocating irrecoverable costs between claimants. Whilst recognising the reliance places on the figures of Professor Fenn it is surely essential those figures are properly analysed and tested before such assumptions are accepted. The concern is that

claimants will suffer a shortfall in damages and many claimants' solicitors will not be the "winners" the report anticipates.

The report concludes referral fees are not necessary and, indeed, offensive and wrong. APIL reluctantly supported lifting the ban on referral fees, because that ban was proving ineffective and affording little or no protection for the consumer. Accordingly, it is essential any reintroduction of a ban avoids the recurrence of previous problems.

The report proposes all costs for personal injury litigation conducted in the fast track be fixed. This recommendation would effectively remove the "polluter pays" approach to costs. If implemented the sensible defendant, who makes reasonable admissions and appropriate offers to resolve the case quickly, will secure no benefit in costs. Conversely, the defendant who leaves everything in issue, dragging the case out, will not be penalised in costs.

Moreover, a system of fixed costs, in what is inevitably an unpredictable process, raises serious questions about access to justice. Claimants with relatively straightforward cases are likely to continue securing representation (though the prospect of recovering greater costs than at present on the more straightforward case, inevitable on a simple "swings and roundabouts" approach fixing costs, might have the perverse effect of increasing competition for and hence the cost of acquiring such work). Conversely, the claimant with a more difficult or complex case might well encounter difficulties securing funding to pursue the claim as, on the same "swings and roundabouts" approach, lawyers running those cases would not, by definition, receive proper remuneration for the necessary work.

Additionally, simply fixing costs, without regard to the individual case or claimant could have other undesirable consequences. What of, for example, the injured person who does not speak English or the claimant with some other disability which would necessitate additional work on the part of the lawyer? The current scheme, which allows the costs appropriate to the particular claim and claimant on a case by case basis, avoids such risks of, inadvertent, discrimination.

The report recommends that, in appropriate circumstances contingency fees be allowed. Such arrangements are commonplace in jurisdictions which do not have recoverability of costs but here conditional agreements, which stakeholders have worked hard to make effective, fit more comfortably with this need to combine risk assessment and costs recovery.

The recommendations must, as the report acknowledges, been seen as interlocking pieces of a whole picture. It is essential, therefore, to properly cost out implementation of all the proposals. It is also essential to guard against unintended consequences. APIL, as ever, remains committed to dialogue in these tasks.